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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEORGE SANO,

Plaintiff, Cross-defendant and Appellant,

v.

DEVAN SHOCKLEY et al.,

Defendants, Cross-complainants and Respondents.

G056240

(Super. Ct. No. 30-2016-00853499)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Law Office of Donald R. Hall and Donald R. Hall for Plaintiff, Cross-defendant and Appellant.

Michael Creamer for Defendant, Cross-complainant and Respondent Devan Shockley.

* * *

INTRODUCTION

An arbitrator awarded Devan Shockley $450,000 for breach of fiduciary duty and $6,798 for diversion of business based on findings that George Sano had set up a competing business in violation of their partnership agreement. Sano appeals from the judgment confirming the arbitrator's award. He argues the arbitrator exceeded his powers because the award of $450,000 in damages for breach of fiduciary duty bore no rational relationship to the conduct constituting the breach.

Although we reject Shockley's assertion that Sano waived his right to appeal, we affirm the judgment. There is no question the arbitrator had the power to award money damages. Sano's argument that the arbitrator exceeded his authority in awarding $450,000 in damages for breach of fiduciary duty is tantamount to arguing the arbitrator committed an error of fact or law, which does not come within our limited scope of review.

FACTS

The arbitration was not reported; however, the facts set forth in the arbitrator's decision are not disputed for purposes of the appeal. In December 1997, Sano and Shockley entered into a partnership agreement to form Sano Attorney Service, the purpose of which was to provide services such as investigations, process service, and court filings. According to the partnership agreement, the profits and losses would be allocated 60 percent to Sano and 40 percent to Shockley. The partnership agreement had a provision permitting Sano and Shockley to engage in other enterprises "excluding enterprises in competition with the partnership."

In 2005, Sano moved to Colorado, and Shockley and Sano orally agreed to change the partnership to divide profits and losses equally between them. The parties disagreed whether, if Sano returned to California, the equal division would remain or the parties would revert to the 60/40 split.

From 2008 to 2010, Sano embezzled funds from Sano Attorney Service. In July 2010, Shockley filed a complaint against Sano for fraud, breach of fiduciary duty, breach of contract, conversion, and injunctive relief. A preliminary injunction was issued against Sano.

Shockley and Sano entered into a promissory note by which Sano agreed to make monthly payments to reimburse the amount he took from the partnership. Shockley agreed to dismiss his lawsuit with prejudice. At same time, Shockley and Sano entered into a pledge and collateral agreement. Shockley dismissed his lawsuit.

Sano ceased making payments on the promissory note in January 2014, leaving a balance owed of $157,814.88. He created a company that competed with Sano Attorney Service in breach of the noncompetition provision of the partnership agreement.

PROCEDURAL HISTORY

After Sano stopped making payments on the promissory note, Shockley filed a second lawsuit against him for fraud, breach of fiduciary duty, breach of contract, conversion, and other causes of action not relevant to this appeal. Sano filed a cross-complaint against Shockley for partnership dissolution, breach of contract, breach of fiduciary duty, and other causes of action. The matter was submitted to arbitration pursuant to an arbitration clause in the partnership agreement.[1]

The arbitrator ruled that Sano had breached the noncompetition provision of the partnership and his fiduciary duties owed to Shockley. The arbitrator found the breach of fiduciary duty to be "egregious." Based on an expert's findings, the arbitrator found the value of Sano Attorney Service to be $585,000.

[1] The provision entitled "Litigation" states in full: "If a dispute arises and a legal remedy is necessary, all partners agree to waive their rights in the court of law and have an arbitrator, appointed upon mutual agreement by all partners, make a final decision after a hearing before the appointed arbitrator. It is agreed that the arbitrator[']s decision is final and binding and cannot be appealed by another arbitrator or in the court of law. Each partner shall bear their [*sic*] own attorney's fees and legal costs."

The arbitrator awarded Shockley $450,000 for breach of fiduciary duty, $6,798 for diversion of business, and $6,475 in attorney fees. Shockley kept the right to maintain the business name Sano Attorney Service, and Sano was enjoined from using it. The arbitrator equitably divided the assets of Sano Attorney Service equally between Sano and Shockley. Sano's half ($292,500) was subtracted from the arbitrator's award for a net award of $171,273.

Sano brought a petition to correct the arbitrator's award and confirm it as corrected. Shockley brought a petition in the same action to confirm the arbitrator's award. The trial court denied Sano's petition, granted Shockley's petition, and adopted the arbitrator's award as the court's judgment. A judgment in the amount of $171,273 was entered against Sano. He timely appealed from the judgment.

DISCUSSION

I.

Sano Did Not Waive the Right to Appeal From the Judgment.

Shockley argues the parties contractually waived the right to appeal from the judgment confirming the arbitrator's award. Contractual provisions waiving a party's right to appeal a judgment on an arbitration award are enforceable if the intent is "'clear and explicit.'" (*Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125, 1144 (*Emerald*).) A contract provision generally stating an arbitration is nonappealable means only that the parties agreed not to appeal the merits of the arbitration. Such a provision does not mean the parties agreed to waive the right to appeal a judgment on an arbitration award on the limited grounds for judicial review provided in the arbitration statute. (*Ibid.*)

In *Emerald*, the arbitration agreement included a provision stating the parties were "'giving up any rights [they] might possess to have the dispute litigated in a

court or jury trial. By executing this agreement, each party hereto is giving up its or his judicial rights to discovery and appeal.'" (*Emerald, supra,* 9 Cal.App.5th at p. 1144, capitalization omitted.) The Court of Appeal concluded this provision was not a waiver of the right to appeal on the limited grounds for judicial review provided in the arbitration statute. (*Ibid*.)

In *Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 952, the parties' agreement included a provision stating: "'The arbitrator's final award may be entered in any court in the United States and worldwide having jurisdiction thereof. The arbitrator's final award shall be binding and shall be fully enforceable. . . . The Parties waive any right to appeal the arbitral award; to the extent a right to appeal may be lawfully waived.'" The Court of Appeal concluded that provision was "insufficiently clear and express to constitute a waiver of the right to appeal from the judgment entered on the arbitration award." (*Id.* at pp. 953-954.) In *Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074, 1082, 1088-1089, the Court of Appeal concluded the parties did not waive the right to challenge a judgment confirming an arbitration award by agreeing that "'once the arbitrators have rendered an award, no appeal or further proceeding will be possible.'"

In contrast, in *Pratt v. Gursey, Schneider & Co.* (2000) 80 Cal.App.4th 1105, 1107, the parties agreed, "'the right to appeal from the arbitrator's award or any judgment thereby entered or any order made is expressly waived.'" The Court of Appeal concluded this broad language constituted an express waiver of the right to appeal from the judgment confirming the arbitration award. (*Id.* at p. 1110.)

Here, the arbitration provision of the partnership agreement included this waiver: "It is agreed that the arbitrator['']s decision is final and binding and cannot be appealed by another arbitrator or in the court of law." This waiver is similar to those in *Emerald*, *Guseinov*, and *Reisman* and, unlike the waiver in *Pratt*, lacks any explicit waiver of the right to challenge a judgment entered on an arbitration award. Reasonably

read, the appeal waiver in the partnership agreement means the parties agreed to waive any right to appeal the arbitrator's decision on the merits, but did not agree to waive the right to appeal from the judgment confirming the arbitration award on the limited grounds for judicial review permitted under the arbitration statute.

Shockley also contends Sano did not provide an adequate record for the appeal. There is no record of the testimony presented because the arbitration was not reported. The appellate record is sufficient, however, to allow for review on the narrow grounds permitted.

II.

The Arbitrator Did Not Exceed His Powers by Awarding $450,000 for Breach of Fiduciary Duty.

In the absence of a specific agreement otherwise, an arbitrator's award is subject to judicial review only on the grounds identified in Code of Civil Procedure section 1286.2 (grounds for vacating award) and section 1286.6 (grounds for correcting award). (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 380.) A ground for vacating an arbitration award, and the only one asserted by Sano, is "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (Code Civ. Proc., § 1286.2, subd. (a)(4).) In determining whether the arbitrator exceeded his or her powers, we review the superior court's order de novo and give substantial deference to the arbitrator's award. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9 (*Advanced Micro Devices*).)

Sano argues the arbitrator exceeded his powers because damage awards in cases of injury to business are based on net profits, and the arbitrator's award of $450,000 in damages for breach of fiduciary duty bore no rational relationship to the award of $6,798 in damages for diversion of business.

Sano's contention that the amount of damages for breach of fiduciary duty must be rationally related to the damages for diversion of business is based on language from *Advanced Micro Devices.* In that case, the California Supreme Court addressed whether the arbitrator exceeded his authority by awarding intellectual property rights for breach of a technology exchange agreement. (*Advanced Micro Devices*, *supra*, 9 Cal.4th at pp. 366-367.) The Supreme Court concluded: "[I]n the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator. The remedy fashioned by the arbitrator here was within the scope of his authority as measured by that standard." (*Id.* at p. 367.)

Advanced Micro Devices dealt with the arbitrator's power to award different kinds of remedies, not the issue whether the arbitrator exceeded his authority by awarding an incorrect measure of money damages. Here, there is no question the arbitrator had the authority to award the remedy of damages. Sano is, in effect, arguing the arbitrator applied the wrong measure of damages for breach of fiduciary duty or that the award of damages was not supported by the evidence. The pertinent rule is that an arbitrator's decision is not generally reviewable for error of fact or law, even if the error appears on the face of the award and causes substantial injustice to the parties. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6 (*Moncharsh*); see *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1006 [claim that the arbitrator awarded excessive punitive damages is nonreviewable claim of error of law].)

If the arbitrator in this case awarded excessive damages, that would be no different from any other error of fact or law. We cannot review such error even if it appears on the face of the award. (*Moncharsh*, *supra*, 3 Cal.4th at p. 6.) Sano does not contend the arbitrator's award violated an established public policy (*Paramount Unified*

School Dist. v. Teachers Assn. of Paramount (1994) 26 Cal.App.4th 1371, 1385-1386) or the arbitration process was unfair (*Moncharsh, supra*, 3 Cal.4th at p. 12).

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.